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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-1543

WILLIE JOHNSON, JR.,

Petitioner,

—v.—

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL AND BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Respondents,

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this case on November 27, 1973.

Opinions Below

1. District Court's order in No. C-71-66 dismissing claims under 42 U.S.C. §1981 and granting summary judgment to union locals and partial summary judgment to REA Express on Title VII claims, June 14, 1971, reported at 7 CCH EPD ¶9108 (1a-3a).[1]

[1] This form of citation is to pages of the Appendix.

2. District Court's order in No. C-71-66 dismissing action without prejudice, February 16, 1972, reported at 7 CCH EPD ¶9109 (4a-5a).

3. District Court's opinion and order in No. C-72-183 dismissing refiled complaint, January 25, 1973, reported at 7 CCH EPD ¶9110 (6a-12a).

4. Opinion of Court of Appeals, November 27, 1973, reported at 489 F.2d 525 (13a-21a).

5. Order Denying Rehearing, January 15, 1974, reported at 489 F.2d 525, 530 (22a-26a).

Jurisdiction

The Court of Appeals entered judgment on November 27, 1973. A timely request for rehearing was denied January 15, 1974, and this petition for certiorari has been filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

Questions Presented

1. Whether the timely filing of a charge of employment discrimination with the Equal Employment Opportunity Commission pursuant to Section 706 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5, tolls the running of the period of limitation applicable to an action based on the same facts brought under the Civil Rights Act of 1866, 42 U.S.C. §1981?

2. Whether a person who claims that he has been discriminated against in employment on account of his race

should be denied a hearing on the merits on any of the following grounds:

a) As to his cause of action under 42 U.S.C. §1981—

i) That Tennessee's one-year statute of limitations on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" bars an employment discrimination suit seeking injunctive relief and back pay;

ii) That failure to exhaust administrative remedies under the Railway Labor Act bars a suit;

b) As to his cause of action under Title VII, a suit dismissed without prejudice for failure to obtain counsel must be refiled within 30 days of the order of dismissal and the order may not be reopened under Rule 60(b), F.R. Civ. P.; and

c) As to his causes of action under either statute, an interlocutory order granting unopposed motions for summary judgment in an action subsequently dismissed without prejudice for failure to obtain counsel has *res judicata* effect.

Statutory Provisions Involved

1. United States Code, Title 42, Section 1981 (The Civil Rights Act of 1866) provides:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall

be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

2. United States Code, Title 42, Section 2000e-5(e) (Section 706(e) of Title VII of the Civil Rights Act of 1964, 78 Stat. 259) (prior to its amendment by Pub.L. 92-261) reads as follows:

> If within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) (except that in either case such period may be extended to not more than sixty days upon a determination by the Commission that further efforts to secure voluntary compliance are warranted), the Commission has been unable to obtain voluntary compliance with this title, the Commission shall so notify the person aggrieved and a civil action may, within thirty days thereafter, be brought against the respondent named in the charge (1) by the person claiming to be aggrieved, or (2) if such charge was filed by a member of the Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs, or security. Upon timely application, the court may, in its discretion, permit the Attorney General to intervene in such civil action if he certifies that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State or local proceedings described in subsection (b) or the efforts of the Commission to obtain voluntary compliance.

3. Tennessee Code, Section 28-304, 5 Tennessee Code Annotated 255, provides, in pertinent part:

> *Personal tort actions—Malpractice of Attorneys—Civil rights actions—Statutory penalties,*—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under federal civil rights statutes, and actions for statutory penalties shall be commenced within one (1) year after the cause of action accrued. . . .

Statement of the Case

Petitioner, Willie Johnson, Jr., is a black man who claims to have been subjected by respondents to racial discrimination in the terms and conditions of employment. Petitioner's claims have never received a determination of their merits by a federal court. The procedural vicissitudes of this litigation, therefore, form the basis of this petition.

Petitioner was employed by respondent Railway Express Agency Inc. ("REA") in the spring of 1964 as an express handler in Memphis, Tennessee. Approximately thirty days after his hire date, and pursuant to respondent REA's direction or referral, petitioner became a member of respondent Brotherhood of Railway Clerks Lily of the Valley Local. More than one year after his initial employment petitioner became a truck driver with REA.

On May 31, 1967, petitioner filed a timely charge with the Equal Employment Opportunity Commission ("EEOC") charging respondent REA with discriminating against its

black employees with respect to seniority rules and job assignments. He also charged respondent union locals with maintaining racially segregated locals, Brotherhood of Railway Clerks Tri-State Local for whites and Lily of the Valley Local for blacks. On June 20, 1967 respondent REA terminated petitioner's employment, and on September 6, 1967 petitioner amended his EEOC charge to allege that he had been discharged because of his race.

The EEOC issued a report on December 22, 1967 concluding that respondents had engaged in unlawful racially discriminatory employment practices, in that REA directed black employees to membership in Lily of the Valley Local and white employees to membership in Tri-State Local, that membership dues were higher in the black local than in the white local, that REA maintained racially segregated job classifications, that respondent REA's seniority system and job assignments were discriminatory, that REA discriminated against blacks in the imposition of disciplinary action, and that petitioner was discriminatorily discharged. On March 31, 1970 the EEOC issued a decision finding reasonable cause to believe that respondent had violated Title VII of the Civil Rights Act of 1964, and on January 10, 1971 petitioner received from the EEOC a notice of his right to bring suit within 30 days.

Petitioner was unable to obtain private counsel and District Judge Bailey Brown entered an order February 12, 1971 appointing an attorney to represent petitioner and allowing petitioner's notice of right to sue to be filed as a complaint on a pauper's oath.

The court-appointed attorney filed a "Supplemental Complaint" alleging violation of Title VII and 42 U.S.C. §§1981 et seq., and invoking the Court's jurisdiction under 28 U.S.C. §1343(4) and 42 U.S.C. §2000e-5f. The complaint

filed March 18, 1971 alleged that respondent REA, in conjunction with respondent union locals, engaged in a policy and practice of discriminating against black employees with respect to promotional opportunities and that respondent's job assignment and promotion practices served "to maintain a preexisting pattern of racial discrimination in employment." Petitioner further alleged that he had been denied supervisory training and promotion opportunities which were accorded to white employees, that respondent union locals did not afford black members (including petitioner) the same quality of representation afforded to white members, and that petitioner's discharge was the result of respondent REA's racially discriminatory employment practices. Petitioner prayed for preliminary and permanent injunctive relief, back pay, costs and attorney's fees.

Respondents REA and union locals filed their answers on March 29 and April 6, 1971, respectively. The case was then scheduled for trial on August 18, 1971.

On April 30 and May 11, 1971, the unions and REA, respectively, filed motions to dismiss or in the alternative for summary judgment.

Petitioner's court-appointed attorney filed no memoranda or affidavits on behalf of petitioner in opposition to these motions.

Judge Brown entered an order June 30, 1971 which, *inter alia*, 1) dismissed all claims based on 42 U.S.C. §1981 as barred by Tennessee's one-year statute of limitations for actions "for compensatory or punitive damages, or both, brought under the federal civil rights statutes"; 2) granted summary judgment to the defendant unions; and 3) granted REA partial summary judgment on the issue of improper supervisory training (1a-3a).

Thereafter, the case having been rescheduled for trial on February 2, 1972, respondent REA served petitioner with interrogatories, filed a pre-trial memorandum as required by local rules of court, and took petitioner's deposition. Petitioner's court-appointed counsel took no discovery, by interrogatories, deposition, or otherwise, and filed no pre-trial memorandum.

REA offered Johnson a settlement of one hundred and fifty dollars which Johnson refused. Petitioner's counsel then filed, on January 5, 1972, a motion to be relieved as attorney of record on the grounds that petitioner's case was "questionable," petitioner had not substantiated money damages and had not expressed an intention of advancing the funds necessary for taking depositions, and because petitioner had refused REA's settlement offer. The clerk of the district court advised petitioner by letter dated January 14, 1972 that the motion to withdraw had been granted, and informed plaintiff that if he did "not obtain another counsel to represent [him] within 30 days from this date, [his] claim will be dismissed without prejudice."[2]

Upon receipt of the clerk's letter, petitioner, in an effort to obtain representation, contacted the Memphis EEOC field attorney, the Memphis & Shelby County Legal Services Association, the Shelby County Bar Association Legal Referral Service, and two private attorneys. Finally at the end of the 30 days he returned to the firm of Ratner, Sugarmon & Lucas[3] and explained his plight to William E. Cald-

[2] Petitioner received no notice of a hearing on the motion to withdraw and was afforded no opportunity to state his position. The court made no finding that petitioner was either unable or unwilling to proceed *pro se* or that petitioner was responsible for any delay in bringing the case to trial. No order granting the motion to withdraw was ever entered.

[3] Petitioner had first contacted this firm after receipt of his notice of right to sue. The firm was unable to undertake the representation of petitioner because of his inability to defray litigation expenses and because of the great number of pending Title VII cases to which the District Court has appointed the firm.

well of the firm. On February 17, 1972 Caldwell wrote a letter to Judge Brown indicating that he was attempting to obtain financial support for the litigation and requesting an additional thirty days for petitioner to obtain counsel. However, the preceding day, February 16, Judge Brown had entered an order dismissing petitioner's case "without prejudice" (4a-5a).

On May 5, 1972, Caldwell again wrote to Judge Brown indicating that the NAACP Legal Defense and Educational Fund had agreed to pay litigation costs for petitioner, entering an appearance for petitioner, and requesting that the order of February 16 be vacated and that the case be reinstated on the active docket of the court. Judge Brown replied on May 8, 1972 indicating that the "proper way to handle this matter would be to file a new action since the old one has long been dismissed."

Pursuant to Judge Brown's letter, Caldwell, on May 31, 1972, filed a new complaint on petitioner's behalf (Civil Action No. G-72-183), assigned to District Judge Harry W. Wellford. The new complaint reiterated petitioner's original allegations. Respondent REA and union locals moved for dismissal or for summary judgment on the grounds of untimeliness and *res judicata*. The district court, per Judge Wellford, entered an order of dismissal on the grounds that 1) Judge Brown's interlocutory order of June 14, 1971 granting summary judgment to respondent union locals and partial summary judgment to respondent REA was a "final disposition" constituting *res judicata*, 2) that petitioner's claims under 42 U.S.C. §§1981 et seq. were barred by Tennessee's one-year statute of limitations on "actions for compensatory or punitive damages,

or both, brought under the federal civil rights statutes" [4] and because plaintiff did not pursue his administrative remedies under the Railway Labor Act, and 3) that petitioner had "failed to meet the statutory requirements" of Title VII because he failed to refile his suit within 30 days after Judge Brown's February 16, 1972 order of dismissal without prejudice (6a-12a).

The Court of Appeals affirmed the order of dismissal, disposing of the case on timeliness grounds (13a-21a). First, the Court of Appeals held that the Title VII claims were jurisdictionally barred because "at a minimum [petitioner] had to file the new case within thirty days from the date of dismissal without prejudice." [5] Second, the court held that petitioner's claims under 42 U.S.C. §1981 were time-barred by the running of the statute of limitations. In reaching this conclusion as to the Section 1981 claims the Court of Appeals held: a) that the applicable statute was the one-year limitation contained in Tenn. Code §28-304; and b) that the running of the statute on the Section 1981 claims was not tolled by petitioner's timely filing of charges with the EEOC.[6] The Court of Appeals did not discuss the issues of *res judicata* and exhaustion of remedies under the Railway Labor Act or the failure of the District Court to grant petitioner relief from the dismissal without prejudice pursuant to Rule 60(b).

In its opinion denying rehearing, the Court of Appeals reaffirmed its initial opinion, stating that Tennessee's attempted application of a one-year limitation period to all

[4] Tenn. Code §28-304.

[5] With regard to Judge Brown's February 16, 1972 order of dismissal without prejudice, the Court of Appeals stated:

> "We need not determine the propriety of this order because it was a final order from which no appeal was taken" (15a).

[6] If the statute had been so tolled, petitioner's second complaint, even if regarded as a new action, would have been timely filed.

civil rights actions, regardless of their nature, is not "arbitrary in a constitutional sense" and the statute does not create "an explicit racial classification . . . because citizens of all races are entitled to take advantage of the federal civil rights statutes" (22a-26a).[7]

Reasons for Granting the Writ

1. Assuming for purposes of argument that it was proper to apply to petitioner's claim under 42 U.S.C. §1981 the one-year limitation period provided in Tenn. Code §28-304, even petitioner's second complaint (with respect to his Section 1981 claim) would have been timely had the court below held that the running of the period had been tolled by his filing of a charge with the EEOC.[8] Its holding to the contrary squarely conflicts with decisions of the District of Columbia Circuit and Fifth Circuit Courts of Appeals[9]—indeed, the court below expressly acknowledged its disagreement with the Court of Appeals for the District of Columbia (25a). Moreover, the decision below is incompatible with the flexible approach to overlapping remedies in employment discrimination cases—viz., that pursuit of one does not preclude another—taken by this Court in *Alexander* v. *Gardner-Denver Co.*, —— U.S. ——, 39

[7] In a footnote, the court stated that it agreed with the district court on the *res judicata* question.

[8] Petitioner filed his charge with the EEOC on May 31, 1967, while still employed by REA. The discriminatory acts alleged therein were continuing in nature, so that none of the one-year period had run prior to said filing. The first complaint was filed 25 days after termination of EEOC proceedings, that is, after petitioner received his notice of right to sue; and the second complaint was filed 105 days after the first complaint was dismissed without prejudice. Hence only 130 days of the one-year period had run when the second complaint was filed.

[9] *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 n.30 (D.C. Cir. 1973); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, 437 F.2d 1011, 1017 n.15 (5th Cir. 1971).

L.Ed.2d 147 (1974) (pursuit of remedy under arbitration clause no bar to Title VII action). The holding of the court below would, if allowed to stand, interfere substantially with the successful administration of Title VII. Persons aggrieved by discriminatory employment practices would be discouraged from invoking the assistance of the EEOC and possibly achieving voluntary compliance, inasmuch as they could preserve their claims under Section 1981 only by filing suit, regardless of whether the EEOC had completed its investigation and its attempts at conciliation.

2. The ruling of the court below affirming the dismissal of (a) petitioner's Section 1981 claims on the further grounds of failure to exhaust administrative remedies under the Railway Labor Act and of untimeliness under a state statute, Tenn. Code § 28-304, imposing a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes," (b) petitioner's Title VII claims on the grounds of his failure, when unrepresented by counsel, to refile within thirty days after dismissal without prejudice (petitioner having been given no notice of this requirement),[10] and (c) petitioner's claims, under both statutes, against the unions and, as to failure to train, against REA, on the ground of *res judicata*, so far sanctioned a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision. This court should not allow the great national values expressed in the Civil Rights Acts of 1866 and 1964 to be frustrated by technical rules which, woodenly applied,

[10] In its order denying rehearing, the Court of Appeals makes an observation which suggests that petitioner was directed to refile his complaint within thirty days: "[I]t is difficult to see why claimant should have more than thirty days to refile after dismissal without prejudice, particularly when said refiling is ordered by the Court" (24a). This suggestion that "said refiling [was] ordered by the Court" is wholly without support in the record.

deprive a plaintiff—inadequately represented by court-appointed counsel or wholly unrepresented because of the precipitate withdrawal of said counsel—of the opportunity to have his claims of racial discrimination at the hands of large corporations and powerful unions decided on the merits.

I

The Decision Below With Respect to the Tolling Effect of the Filing of an EEOC Charge Conflicts With Other Court of Appeals Decisions on an Issue Having Serious Implications For the Effectiveness of Title VII and Judicial Administration of Important Federal Statutes.

The Court of Appeals' rejection of the rule that the period of limitation applicable to a Section 1981 action should be tolled for the period during which resolution through the conciliation procedures of the EEOC is attempted (20a-21a, 25a-26a), is in conflict with the decisions of the only other courts of appeals, those for the District of Columbia and the Fifth Circuit, which have considered the question, and with the great majority of district court decisions.[11] The Sixth Circuit's holding also conflicts in principle with those decisions in the Fifth, Sixth and Ninth Circuits and various district courts holding that the period of limitations for the commencement of proceedings under Title VII should be tolled for the period during which the

[11] *Macklin* v. *Spector Freight Systems, Inc.*, *supra*, 478 F.2d at 994-95 n.30 (D.C. Cir. 1973); *Boudreaux* v. *Baton Rouge Marine Contracting Co.*, *supra*, 437 F.2d at 1017 n.16 (5th Cir. 1971); *Guerra* v. *Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Tex. 1972); *Henderson* v. *First National Bank of Montgomery*, 344 F. Supp. 1373 (M.D. Ala. 1972); *Reynolds* v. *Daily Press Inc.*, 5 CCH EPD ¶7991 (E.D. Va. 1972). Contra: *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D. Del. 1973).

resolution through arbitration or through the National Labor Relations Board is attempted.[12]

The rationale of the decisions holding that the Section 1981 period of limitation should be tolled by the filing of a charge is that Title VII indicates "a recent Congressional decision to favor informal methods of settlement and conciliation short of litigation in employment cases" and that "[p]laintiffs, who often proceed initially without assistance of counsel and bring their complaint first to EEOC in accord with this legislative policy, should not be penalized for this action when they later sue for relief in District Court under both Title VII and § 1981, which overlaps Title VII." *Macklin* v. *Spector Freight Systems, Inc.*, *supra*, 478 F.2d at 994-95 n.30. Under the contrary rule adopted by the Sixth Circuit, in order for petitioner to have preserved both his Title VII and his Section 1981 claims, he would have to have both filed a charge with EEOC, and, within one year after his discharge (21 months before EEOC made its finding of reasonable cause and two and one-half years before it issued the right-to-sue letter), filed a lawsuit under Section 1981. Such a requirement, by discouraging or rendering futile (by the prior determination of the Section 1981 action) recourse to the Congressionally favored policy of conciliation, would vitiate the administrative procedures of the EEOC and be adverse to the interests of judicial economy.

The view that the Section 1981 limitation period should be tolled during the pendency of proceedings before the EEOC comports with the position adopted by this Court in *Burnett* v. *New York Central R. Co.*, 380 U.S. 424 (1965)

[12] *Culpepper* v. *Reynolds Metals*, 421 F.2d 888 (5th Cir. 1970); *Schiff* v. *Mead Corp.*, 3 CCH EPD ¶8043 (6th Cir. 1970); *Malone* v. *North American Rockwell Corp.*, 457 F.2d 779 (9th Cir. 1972); *Wells* v. *Gainesville-Hall County Economic Opportunity Organization, Inc.*, 5 CCH EPD ¶8541 (N.D. Ga. 1973); *Guerra* v. *Manchester Terminal Corp.*, *supra*.

and reaffirmed in *American Pipe and Construction Co.*, v. *Utah*, —— U.S. ——, 38 L.Ed.2d 713 (1974), that where the policies of ensuring essential fairness to defendants and of barring a plaintiff "who has slept on his rights" are satisfied, a statute of limitations should be tolled during the pendency of a related action the outcome of which could provide the relief plaintiff seeks. The filing of a charge with the EEOC puts the respondent on notice of the charging party's substantive claims. There is neither surprise nor the dredging up of a stale claim, and duplicate adjudication is avoided. See *Henderson* v. *First National Bank of Montgomery*, *supra*, 344 F. Supp. at 1377.

Finally, it is a necessary corollary to this Court's recent holding in *Alexander* v. *Gardner-Denver*, *supra*, that attempts to seek resolution by means other than litigation should be encouraged not only by rejection of the doctrine of election of remedies, but also by adoption of the rule that such attempts toll the applicable statutes of limitations for commencement of litigation.

II

The Failure of the District Court to Protect the Procedural Rights of Petitioner and the Sanctioning of That Failure by the Court of Appeals Make This a Compelling Case For the Exercise of This Court's Supervisory Authority.

a. Petitioner's Section 1981 Claim Should Not Be Barred by Tenn. Code § 28-304.

Even if the period of limitation on petitioner's Section 1981 claim were not deemed tolled by the filing of his E.E.O.C. charge, the first action and the refiled action should have been held timely under Tennessee's six-year

statute of limitations for actions on contracts[13] or its ten-year statute for actions not otherwise provided for.[14]

In both his supplemental complaint filed in No. C-71-66 and his complaint filed in No. C-72-183, petitioner sought injunctive relief from respondent's discriminatory employment practices and an award of back pay and counsel fees. In both actions petitioner's claims under Section 1981 were dismissed by the application of that portion of Tenn. Code § 28-304 which provides a one-year limitation period on "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes" (2a, 10a). The Court of Appeals affirmed, ignoring the point that this action was not one for compensatory or punitive damages, but an action in equity for injunctive relief and back pay.[15] While Tenn. Code § 28-304 may be applicable to other types of civil rights actions, it is clearly inapplicable by its very terms to the case at bar. The Tennessee limitation provision that would seem to apply is either its statute for actions on contracts,[16] given that Section 1981

[13] Tenn. Code §28-309.

[14] Tenn. Code §28-310.

[15] Courts of Appeals which have considered the question have rejected the contention that back pay is "damages":

> "The demand for back pay [in a Title VII action] is not in the nature of a claim for damages, but rather is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not the jury."

Johnson v. *Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969). Accord: *Robinson* v. *Lorillard Corp.*, 444 F.2d 791, 802 (4th Cir.), cert. denied 404 U.S. 1006 (1971); see also, *U.S.* v. *N. L. Industries, Inc.*, 479 F.2d 354, 380 (8th Cir. 1973).

[16] Tenn. Code §28-309 (six years). See *Boudreaux* v. *Baton Rouge Marine Contracting Co., supra*, 437 F.2d at 1017 n.16 (5th Cir. 1971). But see *Buckner* v. *Goodyear Tire & Rubber Co.*, 339 F. Supp. 1108 (N.D. Ala. 1972), *aff'd per curiam*, 476 F.2d 1287 (5th Cir. 1973), in which the court applied a statute of limitations for actions for "injury to the person or rights of another, not arising from contract," but noted that "one may indeed ask whether, after all, the more appropriate standard should be the doctrine of laches." 339 F. Supp. at 1117 n.9.

protects the right "to make and enforce contracts," or its residuary statute for civil actions not otherwise provided for.[17] Under either of these, petitioner's Section 1981 claim was timely filed.

Indeed if, contrary to its plain language, Tenn. Code § 28-304 were applicable, it would be violative of both the supremacy clause of Article VI of the Constitution, in that it discriminates against rights arising under federal laws,[18] and the equal protection clause of the Fourteenth Amendment, in that it creates an (ineptly camouflaged) explicit racial classification, drawing a distinction between those who seek the law's protection against racial discrimination in employment and those who seek to vindicate their employment rights on other grounds.[19]

[17] Tenn. Code §28-310 (ten years). See *Waters* v. *Wisconsin Steel Works of International Harvester Co.*, 427 F.2d 476 (7th Cir. 1970), *cert. denied* 400 U.S. 911 (1970); *Macklin* v. *Spector Freight Systems, Inc., supra*. In *Macklin* the court noted that it did not have to decide whether the contract statute of limitations might be more closely analogous, since the limitation period would have been the same. 478 F.2d at 994-95 n.30.

[18] *Republic Pictures* v. *Kappler*, 327 U.S. 757 (1946), *aff'g* 151 F.2d 543 (8th Cir. 1945); *McKnett* v. *St. Louis & S.F. R.Co.*, 292 U.S. 230 (1934).

[19] *Hunter* v. *Erickson*, 393 U.S. 385 (1969).

b. A Claim Under 42 U.S.C. § 1981 Does Not Require Prior Exhaustion of Administrative Remedies Under the Railway Labor Act.[20]

The ruling of the District Court that petitioner's cause of action under Section 1981 was barred by his failure to pursue his administrative remedy under the Railway Labor Act (10a) is contrary to this Court's holding in *Glover* v. *St. Louis & San Francisco R. Co.*, 393 U.S. 324 (1969). In *Glover*, plaintiffs sued the railroad and the union, claiming that they had been discriminated against on account of their race. Rejecting the contention that the complaint should have been dismissed for failure by plaintiffs to exhaust their remedies under the Railway Labor Act, this Court pointed out that "insistence that plaintiffs exhaust the remedies administered by the union and the railroad would only serve to prolong the deprivation of rights to which these petitioners according to their allegations are justly and legally entitled." 393 U.S. at 331. See also, *Steele* v. *Louisville & Nashville Railroad Co.*, 323 U.S. 192 (1944); *Alexander* v. *Gardner-Denver Co., supra*, 39 L.Ed. 2d at 164, n. 19.

Furthermore, it has been recognized by the Courts of Appeals for the Third, Fourth, Fifth, Seventh, Eighth and District of Columbia Circuits that Section 1981 creates an independent right of action not requiring exhaustion

[20] The Court of Appeals found it unnecessary to rule upon this question. However, since the District Court's holding that petitioner's Section 1981 action should be dismissed for failure to exhaust his Railway Labor Act remedies would keep petitioner out of court even if he should prevail on the tolling issue, we ask the Court to rule on this question in furtherance of sound judicial administration. *McAllister* v. *Magnolia Petroleum Co.*, 357 U.S. 221, 226 (1958).

of administrative remedies under other federal statutes.[21] Clearly, the District Court was in error in ruling that petitioner was barred from suing on his Section 1981 claim for failure to exhaust administrative remedies under the Railway Labor Act.

c. Petitioner's Title VII Action Should Not Have Been Precluded by His Failure to Refile His Complaint Within 30 Days After Dismissal.

After it permitted petitioner's court-appointed attorney to withdraw, the District Court dismissed petitioner's complaint in C-71-66 *sua sponte*, without a hearing. Its order of dismissal contained no notice that petitioner must refile his complaint within thirty days. The subsequent dismissal by the District Court in No. 72-183 of petitioner's Title VII complaint is in conflict with the principles enunciated by this Court with respect to liberal construction of the procedural requirements of Title VII[22] and to the Congressional policy against discrimination.[23]

With respect to the initial filing of a complaint under Title VII, "certain equitable principles may operate to toll the 30 day requirement." *Gates* v. *Georgia Pacific*

[21] *Young* v. *International Telephone & Telegraph Co.*, 438 F.2d 757 (3rd Cir. 1971); *Brown* v. *Gaston County Dyeing Machine Co.*, 457 F.2d 1377 (4th Cir. 1972), *cert. denied*, 409 U.S. 982 (1972); *Caldwell* v. *National Brewing Co.*, 443 F.2d 1044 (5th Cir. 1971), *cert. denied*, 405 U.S. 916 (1972); *Sanders* v. *Dobbs Houses, Inc.*, 431 F.2d 1097 (5th Cir. 1970), *cert. denied*, 401 U.S. 948 (1971); *Waters* v. *Wisconsin Steel Works of International Harvester Co., supra; Brady* v. *Bristol-Myers, Inc.*, 459 F.2d 621 (8th Cir. 1972); *Macklin* v. *Spector Freight Systems, Inc., supra.*

[22] *Love* v. *Pullman*, 404 U.S. 522 (1972).

[23] *Newman* v. *Piggie Park*, 390 U.S. 400 (1968).

Corp., 7 CCH EPD ¶9185 (9th Cir. 1974).[24] This Court has recently affirmed this principle, stating that "the mere fact that a federal statute providing for substantive liability also sets a time limitation upon the institution of suit does not restrict the power of the federal courts to hold that the statute of limitations is tolled under certain circumstances not inconsistent with the legislative purpose." *American Pipe and Construction Co.* v. *Utah, supra,* 38 L.Ed. 2d at 730.[25] Where, as in the case at bar, the plaintiff has not had a clear notice of the time limitation on his right to sue and has acted with all of the diligence and promptness which could be expected, it has been held that the limitation period does not start running until the plaintiff receives explicit notice.[26] That rule should apply here: petitioner's time for refiling his complaint should not have started until the District Court, knowing that he was unrepresented by counsel, notified him that he had thirty days within which to refile.[27]

Similarly, courts have been liberal in their interpretation of what constitutes the commencement of a Title VII action, holding that a motion for appointment of counsel tolls the running of the thirty-day period.[28]

The rationale of these cases applies with special vigor to the instant case. Here petitioner diligently sought to prosecute his action and obtain counsel. He had no notice of his duty to reinstitute suit within 30 days. More importantly, petitioner would never have run afoul of any rule requiring him for a second time to meet the thirty-day filing requirement but for the District Court's *sua sponte* dismissal of his complaint with full knowledge that petitioner had at the outset relied on the court to appoint counsel. The equities here require treating Caldwell's February 17, 1972 letter requesting an additional thirty days for petitioner to obtain counsel as the equivalent of a motion for the appointment of counsel, satisfying the revived thirty-day requirement.

After diligently pursuing his case from May 31, 1967, when he filed his charge with the EEOC, to January 24,

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[24] Accord: *Harris* v. *Walgreen's Distribution Center*, 456 F.2d 588 (6th Cir. 1972); *McQueen* v. *E.M.C. Plastics Co.*, 302 F.Supp. 881 (E.D. Tex. 1969).

[25] See also *Burnett* v. *New York Central R. Co., supra; Holmberg* v. *Armbrecht*, 327 U.S. 392 (1945).

[26] *Gates* v. *Georgia Pacific Corp., supra,* 7 CCH EPD ¶9185 at 6944. Indeed, the Sixth Circuit reversed a lower court's failure to accept a renewed motion for the appointment of counsel made after the first motion had been denied and more than thirty days after the receipt of the notice of right to sue, stating:

> [P]ursuant to the Congressional purpose when after decision on the motion for counsel the time remaining is unreasonably short for securing a lawyer and filing the complaint, the District Judge's order granting or denying the motion for appointment of Counsel should set a reasonable time.

Harris v. *Walgreen's Distribution Center, supra,* 456 F.2d at 592. The only order made by the District Court in C-71-66 relating to dismissal of the action was that entered ~~March~~ February 16, 1972 (4a-5a). That order set no time for the refiling of petitioner's complaint.

[27] Respondents could not be said to be disadvantaged by this rule, since this was a case of first impression in the Sixth Circuit and the Tennessee savings statute, Tenn. Code §28-106 provides a one-year period for commencement of a new action when a "judgment or decree is rendered against the plaintiff upon any ground not concluding his right of action." The only case holding that a Title VII case must be recommenced within 30 days after dismissal without prejudice was *McClendon* v. *North American Rockwell Corp.*, 2 CCH EPD ¶10,243 (C.D. Cal. 1970), where there was no such savings statute.

[28] *Harris* v. *Walgreen's Distribution Center, supra; McQueen* v. *E.M.C. Plastics Co., supra; Prescod* v. *Ludwig Industries*, 325 F. Supp. 414 (N.D. Ill. 1971); *Austin* v. *Reynolds Metal Co.*, 327 F.Supp. 1145 (E.D. Va. 1971).

1973, the date of dismissal of his second complaint, petitioner found himself, in the words of the District Court, in the "regrettable" position of having his complaint "dismissed without a hearing on the merits by reason of the circumstances alluded to" (12a). The court below never discussed one of the questions assigned as error, namely that the District Court abused its discretion by failing to reopen the first action, C-71-66, pursuant to its powers under Rule 60(b), F.R. Civ.P. It could have done so either by treating Caldwell's letters of February 17 or May 5, 1972 or the refiled complaint as a motion, or by acting on its own motion.[29]

This court has established the principle that Rule 60(b) is to be liberally construed and that any doubt is to be resolved in favor of an application to set aside a default judgment or a dismissal for lack of prosecution in order that a case may be tried on the merits. *Klaprott* v. *United States*, 335 U.S. 601 (1949). Numerous courts of appeals have reversed the denial of relief under Rule 60(b)(1) and (6) as an abuse of judicial discretion.[30]

In *Denman* v. *Shubow, supra*, a case strikingly close on its facts to the case at bar, plaintiff, appearing *pro se* in a civil rights action, overslept because he had taken some prescribed medication and missed a calendar call, whereupon his case was dismissed without prejudice for lack of prosecution. In the afternoon of the same day, after calling the clerk to explain his absence and learning of the dismissal, he filed a handwritten motion for reconsideration,

[29] *McDonnell* v. *Celebrezze*, 310 F.2d 43 (5th Cir. 1962); *United States* v. *Jacobs*, 298 F.2d 469 (4th Cir. 1961).

[30] *Denman* v. *Shubow*, 413 F.2d 258 (1st Cir. 1969); *Hutton* v. *Fisher*, 359 F.2d 913, 916 (3rd Cir. 1966); *Radack* v. *Norwegian American Line Agency, Inc.*, 318 F.2d 538, 542 (2nd Cir. 1963); *Rooks* v. *American Brass Co.*, 263 F.2d 166 (6th Cir. 1959); *Patapoff* v. *Vollstedt's, Inc.*, 267 F.2d 863 (9th Cir. 1959).

which the district court denied. The Court of Appeals for the First Circuit reversed, stating:

> "When the circumstances surrounding plaintiff's tardiness were brought to the district court's attention by the motion for reconsideration, we think the ends of justice would have been better served if the district court had taken the necessary steps to assign the case for trial on the merits. This *pro se* plaintiff would thereby have been assured of his day in Court." (413 F.2d at 259.)

Similarly, in the instant case the District Court should have assured petitioner of a trial on the merits by reopening C-71-66 after Caldwell explained petitioner's plight and asked for a thirty-day extension of the time to obtain counsel or after he entered his appearance and asked that the order of dismissal be vacated.

d. Petitioner's Claims Against the Union Locals and Claim Against REA on the Issue of Supervisory Training Are Not Barred by the Doctrine of *Res Judicata*.

In its order of June 14, 1971, the District Court granted summary judgment to respondent union locals and partial summary judgment to respondent REA (2a). Upon the filing of petitioner's second complaint, following dismissal of the first without prejudice, respondents moved to dismiss on the ground, *inter alia*, that the interlocutory summary judgment order constituted *res judicata*. Accepting this contention, the District Court dismissed all of petitioner's claims against the union locals (9a) and his claim against REA on the issue of supervisory training (10a).

On appeal, the Court of Appeals did not discuss this issue, but in its opinion denying rehearing the Court of

Appeals, in a footnote, affirmed the District Court's conclusion (23a).

These rulings are erroneous and should be reversed. It is hornbook law that *res judicata* effect can be given only to final decisions on the merits. See 1B Moore's Federal Practice ¶ 0.401 (2d Ed. 1965). The District Court's summary judgment order dismissing fewer than all of the defendants was neither final nor appealable, Rule 54(b), F.R. Civ. P., as the Sixth Circuit itself has recognized. *Balsbaugh* v. *City of Westland*, 458 F.2d 1358 (6th Cir. 1972). Accord: *Sullivan* v. *Delaware River Port Authority*, 407 F.2d 58 (3rd Cir. 1969); *Hamman* v. *United States*, 399 F.2d 673 (9th Cir. 1968). It could not be given *res judicata* effect, unless by a subsequent order of the court. The only subsequent order, however, was Judge Brown's order of February 16, 1972 dismissing the complaint without prejudice (4a-5a). Since dismissal without prejudice is not an adjudication on the merits, such an order cannot have *res judicata* effect.[31] *Public Service Commission* v. *Brashear* Freight Lines, 312 U.S. 621 (1941). Even if it were thought, as respondents have argued below, that the interlocutory order merged into the subsequent order of dismissal without prejudice, it does not thereby acquire *res judicata* finality.[32] Petitioner, whose first complaint was dismissed solely because he did not have a lawyer, could hardly have been required to appeal a non-prejudicial order on the theory that an earlier order, unappealable at the time of its entry, had acquired a quality of finality which even the later order lacked.

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[31] As the court below noted in another context, "[A]n action dismissed without prejudice leaves the situation the same as if the suit had never been brought" (17a).

[32] *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793 (1949); *Town of Marshall* v. *Carey*, 42 F. Supp. 630, 635 (W.D. Okla. 1941).

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Respectfully submitted,

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Of Counsel

APPENDIX

District Court's Order Dismissing Claims Under 42 U.S.C. §1981 and Granting Summary Judgment to Union Locals and Partial Summary Judgment to REA Express on Title VII Claims

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL C-71-2

THOMAS THORNTON,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants,

—and—

CIVIL C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

REA EXPRESS, INC.; BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL; and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

ORDER WITH RESPECT TO MOTIONS TO DISMISS AND MOTIONS FOR SUMMARY JUDGMENT

Upon consideration, and after argument of counsel, it is hereby ORDERED:

1. Insofar as plaintiffs in both cases sue under Civil Rights statutes other than the Civil Rights Act of 1964, such claims are dismissed for the reasons that there is no Federal statute of limitations governing these claims, that therefore the Tennessee statute of limitations of one year would apply, and both of these claims were barred by such statute at the time they were filed.

2. The motions to dismiss in both cases on the ground that the thirty-day letter filed within the thirty-day period is not sufficient to satisfy the requirement that a complaint be filed within thirty days following the issuance of said letter are overruled. See opinion of Judge Harry W. Wellford, *Joeanna Beckum* v. *Tennessee Hotel*, (W.D. Tenn. 1971) attached hereto. Cf. *Rice* v. *Chrysler Corp.*, —— F. Supp. ——, 3 FEP Cases 436 (E.D. Mich. 1971).

3. The motion of the defendant Union locals for summary judgment will be granted on the grounds that from the undisputed facts plaintiffs have no grounds for relief against said Unions under the Civil Rights Act of 1964.

4. The motions of REA Express, Inc. for summary judgment with respect to the claim of dismissal for not giving plaintiffs supervisory training are granted on the ground that from the undisputed facts plaintiffs have not shown any discrimination in this respect.

5. The motions of REA Express, Inc. for summary judgment with respect to the claim of both plaintiffs of discriminatory discharge and with respect to plaintiff

Johnson's claim of denial of equal promotional opportunities and discrimination in job assignment be and the same are hereby denied.

ENTER this 14th day of June, 1971.

/s/ BAILEY BROWN
Chief Judge

A True Copy
W. LLOYD JOHNSON, *Clerk*

By: A. A. BREAUX
Deputy Clerk

FILED
JUN 14 1971

Clerk U.S. District Court
Western Dist. of Tenn.

District Court's Order Dismissing Action Without Prejudice

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

CIVIL NO. C-71-66

WILLIE JOHNSON, JR.,

Plaintiff,

v.

RAILWAY EXPRESS AGENCY, INC., *et al.,*

Defendants.

ORDER DISMISSING ACTION WITHOUT PREJUDICE

In this cause, this Court heretofore appointed Robert Rose of the Memphis Bar to represent this plaintiff, as well as the plaintiff Thomas Thornton in C-71-2, which are EEOC claims by these plaintiffs against REA Express and others. Thereafter, after various proceedings in these matters, counsel for the plaintiffs appeared in court and stated that he had managed to obtain an offer of settlement from REA Express, that plaintiff Thornton had agreed to accept the settlement, but plaintiff Johnson was unwilling to do so. Counsel further stated to the Court that in all frankness, in view of the staleness of the claim and other reasons, he had strongly recommended these settlements, but had been unable to persuade plaintiff Johnson to accept. The cases were set for trial on February 2,

1972, and Mr. Rose filed a motion on or about January 7, 1972 to be relieved as attorney for plaintiff Johnson, which the Court granted on January 14, 1972. On the latter date, the Clerk of this Court, under direction of the Court, wrote to plaintiff Johnson stating that Mr. Rose had been relieved, that the setting for trial on February 2, 1972 would have to be reset, and that plaintiff Johnson was allowed 30 days from that date to obtain other counsel or his case would be dismissed without prejudice. Since such 30 days have passed without plaintiff having obtained such counsel and so notifying the Clerk as he was directed, this cause should be dismissed without prejudice.

It is therefore ORDERED and ADJUDGED that this action be and the same is hereby dismissed without prejudice.

ENTER this 15th day of February, 1972.

/s/ BAILEY BROWN
Chief Judge

A True Copy.
Attest:
W. LLOYD JOHNSON
(Illegible)

FILED
FEB 16 1972

Clerk U.S. District Court
Western Dist. of Tenn.

District Court's Opinion and Order Dismissing Refiled Complaint

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

No. C-72-183

WILLIE JOHNSON, JR.,

Plaintiff,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants.

ORDER ON DEFENDANT MOTIONS FOR JUDGMENT

This is an action brought by a former employee of Railway Express Agency, Inc. (REA) against that carrier and two local lodges of the BRAC, i.e., the Tri-State Local and the Lily of the Valley Local (BRAC Locals) alleging violations of the civil rights of the plaintiff under federal statute. Jurisdiction is asserted pursuant to the provisions of Title VII of the Civil Rights Act of 1964 (42 U.S.C.A., Sec. 2000e, et seq.), the provisions of other federal statutes protecting civil rights set forth in 42 U.S.C.A., Sections 1981, 1982 and 1988, and the provisions of Title 28 of the United States Code, Section 1343. The complaint asks for injunctive relief, compensatory damages, and the award of costs of the action together with reasonable attorneys' fees.

District Court's Opinion and Order Dismissing Refiled Complaint

Paragraph VIII of the present complaint states that "this is the second complaint filed by plaintiff against defendants REA and Union Locals concerning the matters set forth herein and seeking the relief requested herein." Said paragraph VIII then goes on to recite the following facts with respect to the prior complaint:

> "On February 12, 1971, this Court entered orders appointing Robert E. Rose as attorney for plaintiff and allowing plaintiff's 'Notice of Right to Sue' letter be filed and treated as a complaint on a pauper's oath, which documents were docketed as Civil No. C-71-66. Subsequently, on March 18, 1971, a 'Supplemental Complaint' was filed on plaintiff's behalf by his court-appointed attorney. Defendant REA filed its answer on March 29, 1971, and defendant Union Locals filed their answer on April 6, 1971. Thereafter, the case was set for trial on August 18, 1971. On April 30, 1971, defendants Union Locals filed a motion to dismiss or in the alternative for summary judgment, with supporting affidavits and memoranda of law. May 11, 1971, defendant Union Locals propounded 43 numbered interrogatories to plaintiff. June 3, 1971, defendant REA filed a motion to dismiss or in the alternative for summary judgment, along with supporting affidavits and memoranda of law. No memoranda or affidavits were ever filed on behalf of plaintiff in opposition to defendants' motions.
>
> On June 30, 1971, the Honorable Bailey Brown, Chief Judge of this Court, entered an order on defendants' motions, which: (1) dismissed plaintiff's claims insofar as they were based on statutes other than Title

> VII of the Civil Rights Act of 1964; (2) granted summary judgment to defendant Union Locals; (3) granted summary judgment to defendant REA 'with respect to the claim of dismissal for not giving plaintiffs supervisory training'; (4) denied defendant REA's motion with respect to plaintiff's charge of discriminatory discharge and plaintiff's claim of denial of equal promotion opportunities and discriminatory job assignments; (5) denied the defendants' motions to dismiss on the grounds that filing the 'Notice of Right to Sue' letter did not constitute the filing of a complaint within the time allowed. This order was a consolidated ruling in plaintiff's case and in No. C-71-2 (Thomas Thornton v. the same defendants)."

The complaint, with respect to prior history of this dispute, also sets out in substance that plaintiff's appointed counsel, Mr. Rose, failed to take discovery and to prepare the case for trial, and being dissatisfied with plaintiff's cause of action and his refusal to settle, was permitted by Judge Brown to withdraw as counsel (purportedly without notice to plaintiff) within a few weeks before the date fixed for trial. Plaintiff further asserts and the record bears out in the prior action that Judge Brown directed the Court Clerk to notify plaintiff that if he did not obtain another counsel within 30 days his claim would be dismissed without prejudice.

Plaintiff's present counsel after being contacted (for the second time) by plaintiff within the prescribed 30 day period wrote to Judge Brown within a day or two *after* this period had elapsed, requesting an additional 30 days for plaintiff to secure legal representation. The Court had,

however, on the 30th day (February 16, 1972) entered an order dismissing the case *without* prejudice. This action has been subsequently filed on May 31, 1972.

At no time did plaintiff Johnson appeal to the United States Court of Appeals for the Sixth Circuit the order of Judge Brown dated June 14, 1971, granting the BRAC Locals summary judgment with respect to the claims upon Title VII of the Civil Rights Act of 1964 and dismissing plaintiff Johnson's claims based upon other federal statutes.

Plaintiff's Claim Against Defendant Unions

This action clearly involves the same parties and the same subject matter of dispute as were before Judge Brown.[1] Unless plaintiff can establish a basis for us to act otherwise, the doctrine of res adjudicata would bar his bringing this claim again after a final disposition by Judge Brown. *Sopp* v. *Gehrlin*, 236 F. Supp. 823 (W.D. Pa. 1964) and *Burton* v. *Peartree*, 326 F. Supp. 755 (E.D. Pa. 1971), *Vassos* v. *Societa Trans-Oceania*, 272 F.2d 182 (2nd Cir. 1960), *cert. denied*, *Haldane* v. *Wilhelmina Helen King Chagnon*, 345 F.2d 601 (9th Cir. 1965). We do not subscribe to any theory that because of alleged improper representation, absent fraud or wrongdoing on defendant's part, that a civil litigant should be permitted a "second bite at the apple" after an adverse ruling in a prior proceeding resulting in an unappealed final decision of a court assertedly having proper jurisdiction. Of course, if Judge Brown had no such jurisdiction of thet parties, neither do we. The motion of defendant unions, either for dismissal, or for summary judgment, is granted on grounds of res adjudicata. Other grounds are discussed hereinafter.

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[1] The complaints in both causes are substantially similar.

District Court's Opinion and Order
Dismissing Refiled Complaint

Plaintiff's Claim Against REA

1. Plaintiff's claims of violation of his civil rights under 42 U.S.C. 1981 through 1988 were properly dismissed and are here dismissed because barred by the applicable Tennessee one year statute of limitations. *Ellenburg* v. *Shepherd*, 406 F.2d 1331 (6th Cir. 1968) and *Mulligan* v. *Schlachter*, 389 F.2d 231 (6th Cir. 1968). In addition, plaintiff's cause of action under these sections would be subordinate to provisions of the Railway Labor Act which governs the defendant employer (and the defendant unions). See also *Oliphant* v. *Brotherhood Firemen, et al.*, 262 F.2d 359 (6th Cir. 1958) *cert. denied*, 359 U.S. 935. No effort was made by plaintiff to protect or assert his rights under the administrative procedures available under that Act. As to all claims of plaintiff other than those asserted under Title VII of the 1964 Civil Rights Act, then, the cause of action is barred under the statute of limitations defense asserted by all defendants and because plaintiff did not pursue his administrative remedy under the Railway Labor Act.

2. Judge Brown's previous order of June 14, 1971, granted defendant REA's motion for summary judgment after a hearing with respect to plaintiff's claim regarding lack of supervisory training "on the ground that from the undisputed facts plaintiff[s] have not shown any discrimination in this respect—" Judge Brown considered the affidavits and evidence before him and dismissed plaintiff's claim in this particular. We hold that Judge Brown's ruling was a final disposition and constitute res adjudicata as to this aspect of plaintiff's claim.

3. It is also asserted that plaintiff has failed to comply with jurisdictional requirements of the Equal Employment

District Court's Opinion and Order
Dismissing Refiled Complaint

sections of the Civil Rights Act. Judge Brown ruled that under the then circumstances of the case the "30 day provision" of the act did not bar plaintiff's claim because he relied in part upon the Court for advice as to how to file his claim of unlawful racial discrimination and simply filed his notice or letter from Equal Employment Opportunity Commission giving him the right to sue within the requisite 30 day period. This Court in *Beckum* v. *Tennessee Hotel*, Cause C-70-417, ruled similarly on the same issue on May 6, 1971. In *Beckum, supra*, however, we did not rule as to whether this procedure met minimal requirement of F.R.Civ. P. 8a(2). Further complications ensued in this case after Judge Brown's initial ruling on the 30 day statutory requirement and plaintiff's suit was dismissed without prejudice,[2] February 16, 1972. Plaintiff's counsel wrote Judge Brown again on May 3, 1972,[3] requesting reinstatement of the cause explaining the financial inability of plaintiff, and also seeking vacation of the Court's previous order. This Judge Brown declined to do since the case "has long since been dismissed".[4]

Considering all the circumstances of the matter, we find reluctantly that plaintiff has failed to meet statutory requirements and that his refiling should have taken place within 30 days after Judge Brown's February 16, 1972 order. The Chief Judge extended unusual consideration to plaintiff that would not have been granted ordinary civil litigants and we cannot hold under the circumstances that Title VII Civil Rights Act requirements imposed by Con-

[2] It is noted, however, that notice had been issued to plaintiff that his case would be dismissed if he did not obtain a lawyer by the appointed time.

[3] See Exhibit to complaint.

[4] See Exhibit to complaint.

District Court's Opinion and Order Dismissing Refiled Complaint

gress may be indefinitely extended by the Courts. Defendant REA's motion to dismiss will therefore be granted. *See Goodman* v. *City Products Corp.*, 425 F.2d 702 (6th Cir. 1970), *Brady* v. *Bristol-Myers, Inc.*, 332 F. Supp. 995 (E.D. Mo. 1971).

It should also be observed that the Equal Employment Opportunity Commission in this case was perhaps partially at fault in the handling of plaintiff's complaint because of the long 4 year delay involved in processing the complaint before issuance of the right to sue notice. It is regrettable that plaintiff's complaint should be dismissed without a hearing on its merits by reason of the circumstances alluded to in this order.

We, nevertheless, grant all defendants' motions and dismiss the complaint filed herein for the reasons stated, but at the cost, under the circumstances, of REA.

HARRY W. WELLFORD
United States District Judge

Date: 1/24/73

A True Copy.

Attest:

W. LLOYD JOHNSON, *Clerk*
By A. A. BREAUX D.C.

FILED
JAN 25 1973

Clerk, U.S. Dist. Court
Western Dist. of Tenn.

Opinion of Court of Appeals

No. 73-1306

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

v.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

APPEAL FROM UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

Decided and Filed November 27, 1973.

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

WEICK, Circuit Judge. This appeal is from an order of the District Court dismissing plaintiff's complaint which alleged employment discrimination.

Plaintiff-appellant, Willie Johnson, filed timely charges with Equal Employment Opportunity Commission (EEOC) in 1967 in which he alleged that his employer, Railway Express Agency, Inc. (REA), discriminated against him with

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

regard to seniority rules and job assignments. Johnson further asserted that he had been discharged by REA because of his race (black). Johnson also charged the Brotherhood of Railway Clerks Tri-State Local and the Lily of the Valley Local with maintaining segregated Locals.

On December 22, 1967 EEOC filed a report concluding that the company and the unions had engaged in discriminatory practices; however, it was not until January 15, 1971 that Johnson received his notice of right to sue letter from EEOC. Initially Johnson was unable to retain a lawyer to file suit authorized by the letter. On February 12, 1971 District Judge Bailey Brown allowed Johnson to file the EEOC notice-letter with the Clerk as satisfying the duty to institute suit within thirty days from date of receiving notice. Judge Brown further allowed Johnson to proceed *in forma pauperis* and appointed an attorney to represent him. The court-appointed attorney filed an amended complaint on March 18, 1971, setting forth in more detail Johnson's claims.

At this point both defendants moved for summary judgment supported by affidavits. The unions also propounded to plaintiff interrogatories, which he answered. Plaintiff submitted no affidavits in opposition to these motions.

On June 14, 1971 the Court entered an order which—

(1) dismissed all claims based on statutes other than Title VII of the 1964 Civil Rights Act as barred by Tennessee's one-year statute of limitations,

(2) denied the defendants' claims that the filing of the EEOC notice-letter was insufficient to meet the thirty-day filing requirement,

(3) granted the two unions' motions for summary judgment, holding that the plaintiff had no claim against them under the 1964 Civil Rights Act,

(4) granted the motion of REA for summary judgment regarding improper supervisory training, and

(5) denied REA's motion for summary judgment regarding Johnson's claims of discriminatory discharge, denial of promotional opportunities, and discrimination in job assignment.

After this ruling, REA offered Johnson one hundred fifty dollars in settlement of the case; Johnson refused. Subsequently the case was assigned for trial and Johnson's court-appointed attorney, with the Court's permission, withdrew from the case on January 14, 1972. On that date the Clerk of the District Court, acting pursuant to the Court's direction, wrote a letter to Johnson giving him thirty days in which to obtain a new attorney or have his case dismissed without prejudice. Johnson did not obtain a new attorney within such time, and on February 16, 1972 Judge Brown entered an order dismissing the action without prejudice. We need not determine the propriety of this order because it was a final order from which no appeal was taken.

On February 17, 1972 William Caldwell, now one of Johnson's lawyers, wrote to Judge Brown informing him that he, Caldwell, was looking for financial support which would enable him to take Johnson's case. The letter was clearly not an announcement that Caldwell was his counsel; the letter stated only that he might be Johnson's counsel at some point in the future. Later Caldwell found such financial support and did undertake to represent Johnson. On May 31, 1972 a second complaint was filed against REA and the unions, with Caldwell acting as counsel for Johnson.

All of the defendants moved for dismissal or, in the alternative, for summary judgment. The case was assigned

to District Judge Wellford, who ruled on these motions on January 25, 1973. First, the Court dismissed Johnson's claims against the unions on grounds of *res judicata*, holding that the present suit involved the same parties and the same subject matter decided in the first action where summary judgment was granted by Judge Brown. Second, the Court held that Johnson's claims of violation of his civil rights under 42 U.S.C. §§ 1981 through 1988, were barred by Tennessee's one-year statute of limitations. Third, the Court found that Johnson did not pursue properly his administrative remedies under the Railway Labor Act. Fourth, the Court held that *res judicata* barred Johnson's claims against REA on the issue of supervisory training. Fifth, the Court ruled that Johnson's failure to refile a lawsuit within thirty days from February 16, 1972 (the date of dismissal without prejudice) resulted in a failure to comply with the thirty-day filing requirement.

We will deal first with the thirty-day filing requirement since failure to meet it results in a lack of jurisdiction. *Goodman* v. *City Prods. Corp.*, 425 F.2d 702 (6th Cir. 1970).

Johnson contends that he was not required to file suit within thirty days after dismissal without prejudice. He argues that the only statutory requirement is that he file his original suit within thirty days after receipt of his notice-letter. We disagree. We rely on our decision in *Bomer* v. *Ribicoff*, 304 F.2d 427 (6th Cir. 1962), and the decision in *McClendon* v. *North American Rockwell Corp.*, 2 CCH Employment Prac. Dec., Par. 10,243 (C.D. Cal. 1970).

In *Bomer*, plaintiff's request for increased benefits under the Social Security Act was denied on August 4, 1959. He was advised that he could file a civil action within sixty days, challenging this determination, since there was a

statutory procedure for such challenge within that time span. He filed such suit on September 30, 1959. On May 5, 1960, on his motion his case was dismissed without prejudice. Plaintiff later refiled his action on May 1, 1961. The Government moved to dismiss, contending that the plaintiff failed to commence suit within sixty days after notice of the final decision on August 4, 1959. The District Judge granted the Government's motion and dismissed the case. In affirming, Judge Shackelford Miller wrote for a unanimous court:

> An action dismissed without prejudice leaves the situation the same as if the suit had never been brought. A. B. Dick Co. v. Marr, 197 F.2d 498, 502, C.A. 2nd; cert. denied, 344 U.S. 878, 73 S.Ct. 169, 97 L.Ed. 680, rehearing denied, 344 U.S. 905, 73 S.Ct. 282, 97 L.Ed. 699; Bryan v. Smith, 174 F.2d 212, 214, C.A. 7th. In the absence of a statute to the contrary a party cannot deduct from the period of the statute of limitations the time during which the action so dismissed was pending. Humphreys v. United States, 272 F.2d 411, 412, C.A. 9th; Willard v. Wood, 164 U.S. 502, 523, 17 S.Ct. 176, 41 L.Ed. 531; DiSabatino v. Mertz, 82 F. Supp. 248, 249-250, M.D.Pa.
>
> The right of action here sought to be enforced is one created by statute and is limited by the provisions thereof as to the time within which the right must be asserted. Such conditions operate as a condition of liability rather than as a period of limitation and there can be no recovery unless the condition precedent is fulfilled. Zeller v. Folsom, 150 F. Supp. 615, 617, N.D.N.Y.; Coy v. Folsom, 228 F.2d 276, 279-280, C.A. 3rd; Ewing v. Risher, 176 F.2d 641, C.A. 10th; Scott v.

Railroad Retirement Board, 227 F.2d 684, 686, C.A. 7th. (304 F.2d at 428, 429)

Additionally, in *Kington* v. *United States,* 396 F.2d 9 (6th Cir. 1968), we held that filing of previous actions in state and federal courts, which were voluntarily dismissed, did not toll the two-year statute of limitations of the Federal Tort Claims Act, 28 U.S.C. § 2401 (b).

McClendon, supra, is the case factually closest to the one at bar. There, plaintiff received a right to sue letter on January 15, 1968, and filed an action on January 19, 1968 which was dismissed without prejudice on September 9, 1969. On October 29, 1969, fifty days later, the plaintiff filed another complaint, identical to the first. Defendant moved for dismissal on the ground that the court lacked subject matter jurisdiction since the complaint was not filed within thirty days following receipt of the right to sue letter.

In *McClendon* the District Court noted that the effect of voluntary dismissals without prejudice, absent a savings statute, was to create a situation the same as though the suit had never been brought. The Court stated:

> Even assuming that the jurisdictional time period should begin to run anew as of the date of voluntary dismissal was entered, such a position would be of no benefit to plaintiff in this case. Dismissal was ordered on September 9, 1969. Suit, however, was brought on October 29, some fifty days later. Thus even if the Section 706(e) time period of thirty days was tolled by the first suit, plaintiff's new suit would still be jurisdictionally defective. 2 CCH E. P. Dec. at 974.

Although *Bomer* and *McClendon* are authority for the proposition that the filing of a suit which was dismissed

without prejudice did not toll the thirty-day filing requirement of Title VII, the District Court was of the view that the complaint should have been refiled within thirty days after such dismissal. But, even extending the time an additional thirty days, the new suit was still jurisdictionally defective because it was not filed within that time.

We are of the opinion that the District Court was clearly correct in holding that at a minimum Johnson had to file the new case within thirty days from the date of dismissal without prejudice.

Any other holding would result in plaintiff's having no time limitation to refile in this type of an action after the action had been dismissed without prejudice. Such latitude for a plaintiff would create uncertainty, delay in processing his claim, and the possibility of stale claims being pursued. Here, the claim was already stale before the initial suit was filed. 42 U.S.C. § 2000e-5(e) was meant to eliminate such possibilities.

Any error that was committed was an error in favor of appellant Johnson. He failed to comply even with the District Court's liberal interpretation of the requirement by his failure to file within thirty days after dismissal. The Title VII claims are thus barred since the Court was without jurisdiction to hear the charges set forth in the new complaint filed on May 31, 1972.

The second question for consideration is whether Johnson's claims under 42 U.S.C. §§ 1981, 1982 and 1983, were time-barred by a Tennessee statute of limitations. Both Judge Brown's first ruling and Judge Wellford's later order found that these claims were time-barred. We agree. It is the duty of Federal Courts to apply the state statute of limitations most analogous to these actions. Appellant agrees

with this but differs only as to what is the most analogous statute.

We feel that the most analogous statute is Title 28, Section 304, of the Tennessee Code. It reads as follows:

> *Personal tort actions—Malpractice of attorneys—Civil rights actions—Statutory penalties.*—Actions for libel, for injuries to the person, false imprisonment, malicious prosecution, criminal conversation, seduction, breach of marriage promise, actions and suits against attorneys for malpractice whether said actions are grounded or based in contract or tort, civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes, and statutory penalties shall be commenced within one (1) year after cause of action accrued.

Appellant contends that while this state statute, Section 304, is appropriate for Sections 1983 and 1985 actions, it is not appropriate for § 1981 actions. However, *Snyder* v. *Swann*, 313 F. Supp. 1267 (E.D. Tenn. 1970), held this precise statute applicable to a Section 1981 action.

Appellant further contends that his complaint sounds in contract and is governed by a six-year statute of limitations. In our opinion, the complaint sounds in tort rather than in contract. Moreover, the very language of the state statute refers to "civil actions . . . brought under the federal civil rights statutes." Thus, the tort-contract dichotomy does not have to be resorted to, given the preciseness of the state statute.

Finally on this point, appellant argues that filing of the charges with the EEOC tolls the statute of limitations under 42 U.S.C. § 1981. We reject this claim. In *Williams* v. *Hollins*, 428 F.2d 1221 (6th Cir. 1970), we declined to toll

the statute in a section 1983 action during the time when plaintiff was in a Tennessee jail, since Section 301 of Title 28 of the Tennessee Code did not contain any such savings clause. In addition, appellant concedes the Title VII and Section 1981 claims are independent. Thus, no reason exists for stopping the running of a state statute of limitations while a charge is pending before the EEOC.

We have considered other points assigned as error, but in view of our disposition of the case they do not require discussion.

The judgment of the District Court is affirmed.

Order Denying Rehearing

No. 73-1306

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

WILLIE JOHNSON, JR.,

Plaintiff-Appellant,

vs.

RAILWAY EXPRESS AGENCY, INC., BROTHERHOOD OF RAILWAY CLERKS TRI-STATE LOCAL and BROTHERHOOD OF RAILWAY CLERKS LILY OF THE VALLEY LOCAL,

Defendants-Appellees.

ORDER ON PETITION FOR REHEARING

Before WEICK, Circuit Judge, O'SULLIVAN, Senior Circuit Judge, and ALLEN,* District Judge.

This cause came on to be heard on the petition for rehearing, with a suggestion that it be heard en banc; and no Judge having requested that a vote be taken on whether said petition should be heard en banc, the petition for rehearing was referred to and was considered and determined by the panel.

The basis of the first part of our opinion was that when a Title VII (1964 Civil Rights Act) action was dismissed without prejudice, the plaintiff against whom the order was

* The Honorable Charles M. Allen, Judge, United States District Court for the Western District of Kentucky, sitting by designation.

entered had thirty days to refile the complaint.[1] Failure to meet this requirement was held to result in a jurisdictional defect.

Appellant's basic argument in his brief supporting the petition for rehearing is that the Tennessee Savings Statute, T.C.A. 28-106, grants an entire year after such dismissal without prejudice to refile in the State Court. Appellant argues that this state statute is applicable because the federal statute involved gives no guidance as to time limitations.

It is clear that in civil rights actions brought under 42 U.S.C. §§ 1981 through 1988, a state statute of limitations is looked to because the federal statute is silent. *Madison* v. *Wood*, 410 F.2d 564 (6th Cir. 1969). However, Title VII of the 1964 Civil Rights Act is far from silent in regard to a limitations period for actions brought pursuant to the Act. It grants to claimants thirty days from the date of receipt of a right-to-sue letter from the Equal Employment Opportunity Commission (hereinafter referred to as EEOC) within which to file suit in the Federal District Court.

The state statute of limitations and its savings clause are never reached in this case because the federal statute is not silent. While the language of the federal statute may not cover the situation precisely, it indicates a clear policy that should be looked to before a state statute is

[1] The District Court held that many of the issues raised by the plaintiff in his second suit were decided against him in the first action in which the Court granted summary judgment against the plaintiff, and reconsideration was barred by the doctrine of res judicata. Johnson did not appeal from these summary judgments. We agree with the District Court that the unions have a complete defense on the ground of res judicata, and that the company likewise has such defense only so far as the claim of improper supervisory training is concerned.

embraced. The federal statute provides that claimants have thirty days from receipt of a right-to-sue letter, to file law suits. If they have only thirty days to file initially, it is difficult to see why claimants should have more than thirty days to refile after dismissal without prejudice, particularly when such refiling is ordered by the Court.

The requirement of refiling within thirty days seems ample time. A complaint is easily drawn and filed; indeed, in this case all that need be done is to refile the original complaint. In these cases of alleged employment discrimination, there is no latent injury waiting to be discovered which would justify an extended period of time in which to refile. The complainant already knew what his grievance was, as it had been pending before EEOC for more than three years before he was authorized to file suit in the District Court. There is no reason not to expect expeditious processing of such claims in accord with a thirty-day requirement.

The second basis for our decision was that appellant's civil rights claims under 42 U.S.C. § 1981 were barred by the Tennessee one-year statute of limitations, T.C.A. 28-304. Appellant's employment was terminated in June, 1967, and the complaint was not filed until March 18, 1971. T.C.A. 28-304 applies to "civil actions for compensatory or punitive damages, or both, brought under the federal civil rights statutes. . . ." Appellant appears not to attack the controlling nature of this statute but rather its constitutionality. Appellant argues that the statute is arbitrary since it places the same limitations period on all federal civil rights statutes.

We see nothing about the statute that violates equal protection or due process rights of any individual. T.C.A.

28-304 is not directed solely at civil rights claims, and even if it were, it would not necessarily be arbitrary in a constitutional sense. The statute applies also to a wide variety of personal tort actions and to claims of malpractice against attorneys.

Appellant relies on *Hunter* v. *Erickson*, 393 U.S. 385 (1969) and suggests that this statute of limitations creates an explicit racial classification. This contention is obviously unfounded because citizens of all races are entitled to take advantage of the federal civil rights statutes.

Finally, appellant argues that the filing of his Title VII claim with the EEOC tolls the state statute regarding his claims under 42 U.S.C. § 1981. In a letter supplementing his brief supporting his petition for reconsideration, appellant cites *Macklin* v. *Spector Freight Systems, Inc.*, 478 F.2d 979, 994-95 (D.C. Cir. 1973), in which the Court stated in a footnote (n.30) that the filing of charges with the EEOC tolled the statute of limitations on a Section 1981 action. We decline to adopt this position.

It appears to us that the footnote in *Macklin* v. *Spector*, *supra*, is inconsistent with the rationale in the text of the opinion. Spector had argued that since no complaint had been lodged with the EEOC, plaintiff's Section 1981 action had to be dismissed. The Court held, and we think correctly, that no exhaustion of EEOC procedures was necessary to bring a Section 1981 claim, because § 1981 constitutes a cause of action separate and independent from a Title VII claim. The Court said:

> ". . . Section 1981 and Title VII, in truth, provide for such radically different schemes of enforcement and differ so widely in their substantive scopes that using the policies behind the latter to create procedural barriers to actions under the former would stretch

> to the breaking point courts' customary duty to accommodate allegedly conflicting legislation." 478 F.2d at 996.

If the two actions "differ so widely in their substantive scopes" the filing of one should not toll the statute of limitations on the other. The Court suggested in the relevant footnote that the basic reason for such tolling was a Congressional desire to favor informal means of accommodation provided for under Title VII. We think that there is enough flexibility in the federal trial system so that conciliation processes will not be destroyed if a Section 1981 case is heard while a Title VII claim is being processed. *Jenkins* v. *General Motors Corp.*, 354 F.Supp. 1040 (D.Del. 1973).

In *Jenkins* the Court also held that no tolling effect on § 1981 claims took place with the filing of Title VII charges with the EEOC. The Court relied heavily on the reasoning in *Young* v. *International Tel. & Tel. Co.*, 438 F.2d 757 (3d Cir. 1971). *Young* held that Title VII claims and § 1981 claims were separate and independent, and that Title VII imposed no jurisdictional barriers to a § 1981 action. We agree with this reasoning and with that included in the text of the opinion in *Macklin* v. *Spector, supra.*

The petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JAMES A. HIGGINS
Clerk

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JAMES A. HIGGINS, Clerk